

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOE DASILVA,

Plaintiff,
vs.

Case No. 20-11358
HON. MARK A. GOLDSMITH

MARK ESPER, et al.,

Defendants.

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ORDER FOLLOWING MARCH 26, 2021 CONFERENCE

The Court held a telephonic status conference on March 26, 2021 regarding a certification of scope employment filed by the United States (Dkt. 31). That document asserts that Defendant Martin Potter was acting within the scope of his employment when committing the wrongdoing alleged in the complaint. It was accompanied by a proposed order substituting the United States as the sole defendant to counts VI and VII of the Amended Complaint (Dkt. 29)—tort claims Plaintiff Dasilva brought against Potter.

Dasilva objects to the entry of that proposed order on the ground that Potter was acting outside the scope of his employment when he sexually harassed Dasilva. He argues that Defendants must file a motion if they wish to substitute the United States as the sole defendant to counts VI and VII. Defendants take the position that under 28 U.S.C. 2679(d)(1) and Osborn v. Haley, 549 U.S. 225 (2007), (i) it is the Attorney General’s sole prerogative to determine the scope of federal officials’ employment, (ii) substitution has already occurred in this case, and (iii) Dasilva bears the burden of filing and prevailing on a motion if he wishes to re-substitute Potter as the defendant to counts VI and VII.

Dasilva and the United States are ordered to file memoranda advising the Court of their positions on the appropriate procedure for adjudicating this issue—that is, whether the substitution has already occurred, and who bears the burden of changing the status quo.¹ These memoranda need not address the merits of whether the substitution is appropriate, as the party determined to bear the burden of proof will have an opportunity to file a motion, and both parties will have the opportunity to file briefs if such a motion is brought. The memoranda may not exceed ten pages and must be filed on or before April 5, 2021.

The deadline for Dasilva to file a response to the pending motions to dismiss (Dkts. 32, 33) is adjourned until further order of the Court.

SO ORDERED.

Dated: March 26, 2021
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

¹ Counsel for Potter in his individual capacity stated at the conference that he will adopt the position taken by the United States.